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IN THE

# Supreme Court of the United States

October Term, 1982

JAMES N. FLEMING
Petitioner

COMMONWEALTH OF VIRGINIA
Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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## QUESTIONS PRESENTED

I

Does the Fourteenth Amendment require a citation for criminal contempt to be tried before an impartial judge when the offended judge admits that the petitioner's spontaneous remark did not disrupt the pending non-jury civil proceedings?

II

Whether the petitioner's spontaneous remark, in reaction to a jail sentence summarily imposed upon him, was speech protected by the First and Fourteenth Amendments?

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The petitioner James N. Fleming respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Virginia entered in this proceeding on October 15, 1982.

## OPINIONS BELOW

The orders of the Supreme Court of Virginia denying petitioner's request for an appeal dated September 23, 1982 and a subsequent order denying petitioner's request for a rehearing dated October 15, 1982 appear in the appendix.

## JURISDICTION

The order of the Supreme Court denying petitioner's request for an appeal was entered on September 23, 1982. A subsequent order denying petitioner's request for a rehearing was entered on October 15, 1982 and this petition for certiorari is filed within 60 days of entry of

that order. This court's jurisdiction is invoked under 28 U.S.C. 1257(3).

## STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

XIV. Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18.456 of the Code of Virginia, as Amended:

"Cases in which courts and judges may punish summarily for contempt. The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following;

(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in

respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

(4) Misbehavior of an officer of the court in his official character;

(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court. (Code 1950, §18.1-292; 1960, c. 358; 1975, cc. 14, 15.)"

## STATEMENT OF THE CASE

Petitioner is a party to a civil case now pending in the Circuit Court for the City of Charlottesville, Virginia (Tarry vs Fleming). On March 15, 1982, in a show cause proceeding immediately after petitioner's counsel had been overruled on a Motion to Quash the Rule and before the matter was taken upon the merits, petitioner who had not testified

or had opportunity to respond to the civil contempt charge on the merits, was found in contempt of court, for having failed to comply with a previous order of the court related to a discovery matter, and sentenced to ten days in jail. The court then directed a bailiff to lock the petitioner up; whereupon his attorney asked that bond be set. The court then set bond at $1,000.00. The petitioner then remarked:

> "I want to say something, too. In the case I filed against Monzella Tarry I put up an accounting. I think the court has been the lowest thing on earth. This court has acted as the lowest thing on earth today."

Thereupon the court sentenced him to an additional ten day jail term, fixed appeal bonds at the request of the petitioner as to both jail terms, and

adjourned court. (see Transcript March 15th-Apendix). Subsequently, the court entered written orders citing and finding petitioner in violation of Virginia Code Section 18.2-456, subsection (3) and 18.2-456, subsection (5).

The subject of this petition for the writ of certiorari grows out of the following charge contained in one of the two orders:

> "By virtue of his misbehavior in the presence of the Court during a civil proceeding therein being heard, the defendant James N. Fleming, is held to be in contempt of court in violation of Section 18.2-456(3) of the Code of Virginia, 1950, as amended, and is summarily sentenced to serve a term of ten (10) days in jail."

Petitioner then filed motions asking that the conviction orders be vacated and that he be permitted a trial on the 18.2-456(3) violation before

an impartial Judge. Petitioner also filed written requests that he be allowed to attempt to purge himself of any contempt he may have shown. A hearing was set for April 1st. At this hearing, petitioner explained that he had complied with the court's discovery order in the civil matter. He also apologized for any improper comment he might have made on March 15th. The court vacated its order as to the 18.2-456(5) violation. It refused, however, petitioner's request to vacate its conviction order as to 18.2-456(3) or to permit him a trial on the charge before an impartial trier of fact. The court reduced the jail sentence given in the case of the second contempt by suspending five days of the ten day sentence, based upon petitioner's apology.

During the April 1st hearing, the court noted in an exchange with petitioner's counsel that petitioner had in no way disrupted its proceedings on March 15th and that he had been found in violation of 18.2-456(3) solely for what he had said:

> "MR. POINDEXTER: Yes, sir. The motion in light of the Court's refusal to vacate the violation of 18.2-456.3 I believe the criminal one, Your Honor. We would just argue at this point that in that the Court is offended and possibly rightfully it should be. The Court is offended by Mr. Fleming's conduct as it perceives it on ... to have been on March 15th that ... as a consequence of that it would be a violation of due process even though the Court has certain summary powers obviously, but it would be a violation of due process in a criminal case where there is uncertainty as to what transpired in here. I have one opinion. Mr. Fleming has another. I'm sure the Court has another. It would seem to be a violation of due process for Your Honor to sit in judgment and we would ask that he be ... the order be vacated

to the point where he be cited for contempt and then he be given an opportunity for a trial before someone who should be unbiased and I mean biased in strictly the legal sense, unbiased, who was not a party to the previous proceedings. And I think that there is law to the effect that should be done in cases such as this. In fact, there was just a case tried in another jurisdiction that was in the paper yesterday in the Washington Post where a judge, I believe it was a woman judge, cited a lawyer for contemptuous conduct during the trial of a case in her court. And the actual contempt was then heard by another judge and, of course, in a criminal matter, Your Honor, the burden continues and the court has resorted to invocation of the criminal statute. The proof of the offense must run beyond a reasonable doubt. Now, obviously nothing occurred in the courtroom which would have been disruptive and I would call Mr. Carter as a witness to the effect that there was no disruption....

THE COURT: no, there wasn't any disruption, just....

MR. POINDEXTER: ....no outbursts, nothing like that in the courtroom....

THE COURT: ...just the statement that this was the lowest court in

> the state and it was low. It certainly evidenced a contemptible feeling at that time, so I..."

(See Transcript of April 1st Appendix). After the April 1st hearing, petitioner filed an additional written motion requesting that the remaining judgment be vacated, raising again due process grounds. This motion was also denied whereupon petitioner noted an appeal to the Virginia Supreme Court assigning as error (1) The trial court's summary conviction of petitioner of contempt upon the basis of the unsworn statement made in its presence; and (2) its refusal to vacate its March 15th order. The Supreme Court rejected petitioner's request for an appeal without a written opinion on September 23, 1982 and similiarly

rejected on October 15, 1982, petitioner's request for a rehearing. In his request for a rehearing, petitioner again urged that the actions of the trial court conflicted squarely with established principles of this court citing Holt vs Virginia, infra, and Eaton vs City of Tulsa, infra, and Craig vs Harney, all of which are cases previously decided by this court. In his petition for appeal, petitioner urged that both errors were violations of his right to due process and his right of freedom of speech as provided by the federal constitution. Petitioner, who remains on bond subsequently, noted his intent with the Circuit Court to petition this court for a writ of certiorari directed at the judgment below.

## REASON FOR GRANTING THE WRIT

### I. PETITIONER'S RIGHT TO DUE PROCESS OF LAW HAS BEEN VIOLATED BY THE REFUSAL OF THE STATE COURTS TO GRANT HIM A TRIAL UPON A CRIMINAL CHARGE OF CONTEMPT BEFORE AN IMPARTIAL TRIER OF FACT.

Section 18.2-456(3) of the Code of Virginia provides in pertinent part:

> "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following":
>
> * * *
>
> "(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding; * * *"

A fundamental requirement in all criminal cases under our system is that a person accused of a crime by an agency of the state be given

notice of the nature of the alleged offense and found guilty beyond a reasonable doubt by an impartial trier of fact in a trial respecting his VI and XIV Amendment rights to a fair trial and to due process of law before he is punished for the alleged offense. Such a requirement which is at the very heart of our criminal justice system, has not been observed in the case of your petitioner.

Our Courts have historically had authority to summarily punish persons for what is perceived as contemptuous conduct but only in the most restricted circumstances. Virginia Code Section 18.2-456 provides no exception to the historical rule. Persons accused of criminally contemptuous conduct

by a court have a right to due process of law. In Holt vs Virginia, 381 U.S. 131 (1965), this Court noted that persons cited for contempt have the same right to notice, assistance of counsel, confrontation, etc., as is extended to any other persons accused of criminal conduct. In the proceeding resulting in his ordered imprisonment in the state circuit courts petitioner enjoyed the benefit of none of his constitutionally guaranteed rights except that he was assisted by counsel.

Petitioner concedes that the due process protections can be held in abeyance where the court is threatened or its proceedings disrupted to allow the court to act to abate or remove an imminent threat to the administration of

justice or to it. He respectfully submits that his comment was neither disruptive nor threatening. Indeed, the court agreed to the assertion of counsel that petitioner had in no way disrupted or threatened the court or its proceedings on March 15th. (See April 1st Transcript-Appendix)

In the case styled In The Matter Of Larry Little, 404 U.S. 553, 30 L.Ed. 2d 708, 92 S.Ct. 659 (1972), the North Carolina courts had held to be contemptuous statements, made in summation, that the court was biased and had prejudged the case and that the accused (arguing pro se) was a political prisoner (404 U.S. at 554). Simultaneously, granting certiorari and reversing, the Supreme Court (in 404 U.S. at 555) noted:

> There is no indication and the State does not argue, that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding. Therefore, "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . . . (T)he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, 331 U.S. 367, 376, 91 L. Ed. 1546, 1552, 67 S.Ct. 1249 (1947). "Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Brown v. United States, 356 U.S. 148, 153, 2 L. Ed. 2d 589, 595, 78 S.Ct. 622, 72 ARL 2d 818 (1958).

Similarly, in Eaton v. Tulsa, 415 U.S. 697, 39 L.Ed. 2d 693, 94 S.Ct. 1228 (1974) this Court reversed, as constitutionally infirmed, the Oklahoma courts' adjudication of

contempt for a "single isolated usage (by a defendant-witness) of street vernacular, not directed at the judge or any officer of the court".

Tested against the foregoing and similar principles, petitioner's spontaneous reaction to an unexpected jail term add up to something less than ideal. Petitioner recognized this and later apologized to the court. It is submitted, however, that petitioner's comment,though ill advised, was not a criminal act nor of such moment that he should have been summarily punished with imprisonment. As was said in Francis v. People of Virgin Islands, 11 F.2d 860, 865 (3rd Cir. 1926):

"In our jurisprudence the extraordinary

action of contempt of court does not lie to heal the wounded sensibilities of a judge; it may be invoked only when the offending act impedes or disturbs the administration of justice."

## II. PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHT OF FREE SPEECH HAS BEEN ABRIDGED BY THE VIRGINIA SUPREME COURT IN AFFIRMING A TERM OF IMPRISONMENT ORDERED BY THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE, VIRGINIA BASED UPON A REMARK MADE IN THE PRESENCE OF THAT COURT IN A CIVIL PROCEEDING.

Petitioner maintains that he has not been contemptuous of the court. Whether petitioner did or did not make a contemptuous remark is not the threshold issue, without the benefits of a trial. The circuit court Judge as the record shows acted summarily in the face of what he

probably saw as a personal attack upon him.

In the case of Cooke vs United States 267 U.S. 517, 69 L.ED 767,45 S. Ct 390 (1925) in which this court reviewed the summary contempt conviction of a lawyer who had written what a District Court Judge considered a disparaging letter to the Judge in an attempt to have the Judge disqualify himself from hearing several pending civil cases involving the attorney and his client; the court made the following pertinent comment:

> Another feature of this case seems to call for remark. The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court, is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory

> where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency, but it is not always possible. Of course, where acts of contempt are probably aggravated by a personal attack upon the judge, in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that, where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. Cornish v. United States (C.C. A.) 299 F. 283, 285; Toledo Co. v. United States, 237 F. 986, 988, 150 C.C.A. 636.

It is respectfully submitted, that nothing has been said by this court in a contempt case since the Cooke case, decided more than fifty years ago

to suggests that this court has a different view of what the proper conduct for a judge should be when he is faced with conduct in his presence which he perceives as containing an "element of personal criticism" to: (1) protect the various rights of the accused, (2) to avoid the appearance of arbitrary or oppressive conclusions, and, (3) to ensure that justice is done in both form and substance. See Taylor vs Hayes 418 U.S. 488, 41 L.Ed 2d 897, 94 S.Ct 2697 (1974), Mayberry v. Pennsylvania 400 U.S. 455, 27 L. Ed 2d 532 91 S. Ct 499.

Due process, as a matter of right, entitles a person charged with a crime, however slight, to a trial before an impartial magistrate to determine guilt or innocence, with the usual attendant constitutional protections to include: notice, a

right to testify, a right to call witnesses, a right to the assistance of counsel, etc. Petitioner has enjoyed no such opportunity. The denial by the city circuit court of the petitioner's request for a trial before an impartial tribunal and the later affirmance of that court's decision by the Virginia Supreme Court constitute serious constitutional violations which this court should address.

The power of our courts to suspend constitutional rights is to be used most sparingly. It is submitted that a series of words of common usage, strung together in the presence of a court which do not threaten the court or impede its work cannot, without more,

lawfully trigger such extraordinary powers. This Court noted in Eaton vs City of Tulsa, 94 S. Ct 1228 (1974), a case in which Terry Eaton had been fined fifty dollars for contempt of court for using the word "chickenshit" to describe an alleged assailant during his testimony in a criminal proceeding, that "the vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not nearly a likely, threat to the administration of justice" lifting the language from this courts earlier decision" in Craig vs Harney 331 U.S. 367 67 S.Ct. 1249 (1947).

Petitioner suffers under a jail sentence although he has had

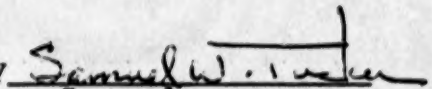
no trial nor anything resembling one. In short, at this stage, he has simply been ordered to serve time in jail because a Judge who had just sentenced him to what petitioner respectfully submits was an unlawful jail term did not like what petitioner said or what he thought he said in reaction to what had been done to him.

## CONCLUSION

Petitioner's remark measured against the Craig caveat, given the setting and circumstances in which it was made, is certainly not a clear transgression of Virginia Code Section, supra, 18.2-446(3) or of the historical body of common law from which our courts derive power and authority to protect themselves and their business by punishing persons for misbehavior committed in their presence at least, so much so that a summary proceeding stripped of all of the due process protections ordinarilly extended to persons adversed of a crime, was warranted. It is, therefore, urged that this Court take this matter up and issue the Writ of

Certiorari to the Virginia Supreme Court and direct that the judgment of the court below be reversed and that the charge of contempt ordered dismissed and petitioner released from his bond.

JAMES N. FLEMING

By 
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